United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

with affidavit

4015

75-0288

To be argued by
THOMAS H. BELOTE

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-0288

ELIAS MBIROS,

Petitioner,

—against—

THE IMMIGRATION AND NATURALIZATION SERVICE, BOARD OF IMMIGRATION APPEALS,

Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Statement of the Case

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a(a), Elias Mbiros petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on December 26, 1974. That order dismissed the petitioner's appeal from an order of an Immigration Judge following a hearing, finding him deportable under Section 241(a)(2) of the Act, 8 U.S.C. § 1251 (a)(2) as a nonimmigrant who had remained longer than authorized. The basis for this decision was that Mbiros had entered the United States on November 19, 1973 as an alien in transit authorized to remain in the United States until November 24, 1973 and had remained in the United States beyond that date without authority.

The petitioner contends that the Board's order should be set aside because his counsel was not present at the deportation hearing.

Issue Presented

Was the alien afforded his Fifth Amendment right of due process in the deportation proceedings below?

Statement of the Facts

The petitioner is a twenty-four year old single alien, a native and citizen of Greece. He was admitted to the United States as a nonimmigrant in transit on November 19, 1973 destined to the vessel "Hellenic Champion", and authorized to remain in the United States until November 24, 1973 (R. 8, p. 3).* He reported to his vessel on November 19, 1973, and deserted on the same day. He failed to depart from this country pursuant to the terms of his visa, and has been illegally residing in the United States since that time.

On January 24, 1974 the Immigration and Naturalization Service ("the Service") commenced deportation proceedings with an order to show cause and notice of a hearing (R. 9). The deportation hearing was conducted on February 4, 1974 before an Immigration Judge with the assistance of an official interpreter provided by the Service. Mbiros was initially questioned as to whether or not there was full comprehension between him and the interpreter (R. 8, p. 1). Thereafter, the Immigration Judge specifically informed Mbiros of the nature of the proceeding and of his right to be represented by counsel at that hearing (R. 8, p. 1). In view of the fact that the alien had appeared at the hearing without an attorney the Immigration Judge thoroughly examined him as to whether or not he wished to proceed without his attorney. In response to the Immigration Judge's questions Mbiros gave the

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* References preceded by the letter "R" refer to the tabs affixed to the Certified Administrative Record filed with the Court.

name of his personally retained counsel and stated that he had been informed by his lawyer that it was unnecessary for counsel to be present at that stage of the deportation proceedings (R. 8, pp. 1, 2). The alien was then fully questioned as to whether or not his representative had been informed of the hearing and nature of the charges, and further, whether or not the alien had informed his attorney that he wished to have counsel present at the hearing (R. 8, p. 2). During this examination the alien informed the Immigration Judge that he had discussed these issues with his attorney and that a decision had been made to proceed without the presence of the attorney (R. 8, p. 2). The alien thereupon voluntarily elected to proceed at the hearing without the presence of his personally retained attorney and directed the Immigration Judge to conduct the hearing (R. 8, p. 2). The alien conceded the factual allegations in the order to show cause, and at the conclusion of the hearing, he was found deportable as charged (R. 7, 8, pp. 3, 4). The Immigration Judge granted Mbiros the discretionary privilege of voluntary departure and entered an alternative order of enforced deportation should the alien fail to depart voluntarily within the time specified (R. 7). The Immigration Judge questioned Mbiros as to whether or not he wished to appeal the decision, and thereafter thoroughly explained the appeal procedures (R. 8, pp. 5, 6).

On February 11, 1974 a timely appeal to the Board of Immigration Appeals was filed on behalf of the alien by his present counsel seeking to reopen the deportation proceedings (R. 4). The sole issue raised on the administrative appeal was the absence of the alien's counsel during the hearing; the alien made no specific showing of prejudice. The appeal was denied by the Board on December 26, 1974.

In accordance with the Board decision, the District Director of the Service Office in Hartford, Connecticut notified the alien to effectuate his voluntary departure on or before January 25, 1975 (R. 2). On January 24, 1975, one

day prior to the alien's departure date, this petition was filed seeking a review of the Board's decision of December 26, 1974. Since the date of filing of this petition, the alien has enjoyed the automatic statutory stay of deportation which accompanies a petition for review filed pursuant to Section 106 of the Act, 8 U.S.C. 1105(a)(3).

Relevant Statute

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended:

Section 242, 8 U.S.C. § 1252—

(b) . . . Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that——

* * * * *

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose; . . .

Immigration and Nationality Act, Section 292, 8 U.S.C. § 1362:

> In any exclusion or deportation proceeding before a special inquiry officer and in any appeal proceedings before the Attorney General from such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

Relevant Regulations

Title 8, Code of Federal Regulations [CFR] § 242.16

(a) Opening. The special inquiry officer shall advise the respondent of his right to representation, at no expense to the Government, by counsel of his own choice authorized to practice in the proceedings and require him to state then and there whether he desires representation; advise the respondent that he will have a reasonable opportunity to examine and object to the evidence against him, to present evidence in his own behalf; and to cross-examine witnesses presented by the Government; place the respondent under oath; read the factual allegations and the charges in the order to show cause to the respondent and explain them in nontechnical language and enter the order to show cause as an exhibit in the record. . . .

(b) *Pleading by respondent.* The special inquiry officer shall require the respondent to plead to the order to show cause by stating whether he admits or denies the factual allegations and his deportability under the charges contained therein. If the respondent admits the factual allegations and admits his deportability under the charges and the special inquiry officer is satisfied that no issues of law or fact remain, the special inquiry officer may determine that deportability as charged has been established by the admissions of the respondent. . . .

ARGUMENT

The petitioner was afforded his Fifth Amendment right of due process in the deportation proceedings below.

A. The alien was represented by counsel of his own choice during the deportation proceedings below.

Deportation proceedings have consistently been held to be civil in nature and not the equivalent of criminal proceedings. *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276 (1966); *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952); *Pilapil* v. *Immigration and Naturalization Service*, 424 F.2d 6 (7th Cir.), *cert. denied*, 400 U.S. 908 (1970). Thereafter the Sixth Amendment's guarantee of counsel to an accused person in a criminal proceeding does not apply to a deportation proceeding. *Laroi* v. *Immigration and Naturalization Service*, 418 F.2d 732 (9th Cir. 1969), *cert. denied*, 400 U.S. 854 (1970); *Murgia-Melendrez* v. *Immigration and Naturalization Service*, 407 F.2d 207 (9th Cir. 1969).

Although the Sixth Amendment does not apply, there is no doubt that an alien in a deportation proceeding is entitled to due process of law under the Fifth Amendment. *Sung* v. *McGrath*, 339 U.S. 33 (1950). Due process requires that an alien may be expelled from this country only after a fair hearing. *Chew* v. *Colding*, 344 U.S. 590 (1953). Furthermore, representation by counsel at the alien's own expense is guaranteed by Sections 242(b) and 292 of the Immigration and Nationality Act, 8 U.S.C. § 1252(b)(2), § 1362. Each of those sections declares that an alien in a deportation proceeding "shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." This statutory guarantee is amplified and

implemented by regulations which provide that at the opening of a hearing, the Special Inquiry Officer is required to advise the respondent of his right to counsel and require the alien to state whether he desires representation. 8 C.F.R. 242.16(a).

The record clearly indicates that Mbiros was represented by counsel prior to, during, and subsequent to the deportation hearing of February 4, 1974. At the opening of the hearing in accordance with 8 C.F.R. § 242.16 the Immigration Judge advised the alien of his right to counsel and required him to state on the record whether he desired representation. In response the alien stated that he had retained counsel, related the attorney's name, and informed the Immigration Judge that he had consulted with his attorney concerning the matters contained in the Order to Show Cause.

Neither the alien nor his attorney at any time preceding or during the deportation proceedings requested an adjournment for any reason. In fact, the contrary conclusion is elicited from the record. According to the alien's testimony, the attorney's apparent strategy in this matter did not necessitate his physical presence at the deportation proceeding. The record specifically shows that the attorney was aware of the hearing and decided it was "unnecessary" for him to be physically present. In view of this, the alien directed the Immigration Judge to have the hearing without the lawyer. "We will proceed without the lawyer today." (R. 2). Nothing appears in the record to indicate that this conscious election to proceed at that single stage of the administrative proceedings below resulted from coercion, intimidation or improper persuasion. This decision was made intelligently and voluntarily on the basis of consultation with his attorney.

B. The alien can waive his statutory right to counsel.

Although the administrative record shows that Mbiros' decision to proceed at the deportation hearing was made voluntarily on his part and with the advice of counsel, this election, in the alternative, was an effective waiver of his right to counsel. Like most valuable rights, the right to counsel in a deportation proceeding can be validly waived. An effective waiver occurs when an alien, fully aware of his right to counsel, chooses to proceed without counsel. *Giamo* v. *Pederson*, 289 F.2d 483 (6th Cir. 1961); *United States ex. rel. Dentico* v. *Esperdy*, 280 F.2d 71 (2d Cir. 1960); *United States ex. rel. Mustafa* v. *Pederson*, 207 F.2d 112 (7th Cir. 1953); *United States ex. rel. Janowski* v. *Shaughnessy*, 186 F.2d 580 (2d Cir. 1951). Of course, this waiver must be made intelligently, with full understanding of the right and voluntarily without coercion or deception. *Van Den Berg* v. *Lehmann*, 261 F.2d 828 (6th Cir. 1958); *United States ex. rel. Dentico* v. *Esperdy, supra.*

As previously mentioned, the alien was duly notified of his right to counsel at the deportation proceeding. Although the record indicates that Mbiros' election to proceed at the hearing was his conscious decision made on advice of counsel, he could waive the right to counsel during that hearing. Assuming *arguendo* that Mbiros had decided he no longer wished to be represented by his lawyer, the election to proceed was a valid waiver and did not violate due process of law. *Strantzalis* v. *Immigration and Naturalization Service*, 465 F.2d 1016, 1018 (3d Cir. 1972); *Velasquez-Espinosa* v. *Immigration and Naturalization Service*, 404 F.2d 544 (9th Cir. 1968); *Giamo* v. *Pederson, supra; United States ex. rel. Dentico* v. *Esperdy, supra; United States ex. rel. Janowski* v. *Shaughnessy, supra.*

C. Mbiros was not prejudiced by the absence of counsel.

The absence of Mbiros' attorney should not in any case be regarded as a fatal flaw in the hearing. The sole issue before the Immigration Judge at the deportation hearing on February 4, 1974, so far as deportability was concerned, was whether or not Mbiros was an alien and whether or not he had overstayed his transit visa. These facts were admitted by Mbiros and are sufficient in themselves to justify deportation.[1]

No complex issue of law was present and the operative facts are undisputed. No witnesses were called, for there was nothing any witness could supply which would change the result. No justification or excuse for overstaying the visa was, or is now offered or suggested. Hence it is difficult to see how the presence of his former attorney could have affected the outcome of that hearing. Both in his appeal before the Board, and in his brief in support of this petition for review, Mbiros has maintained a conspicuous silence as to any prejudice resulting from his decision to proceed in the absence of his former attorney at the hearing on February 4, 1974. Furthermore, the alien was competently represented by his present counsel before the Board wherein he could have asserted prejudice if in fact any existed. From the undisputed facts of this case, the only benefit counsel might have argued for at the deportation hearing would be the discretionary grant of voluntary departure. *Strantzalis* v. *Immigration and Naturalization Service, supra.* This issue is moot since the alien was

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[1] The Immigration Judge is authorized to require a respondent to state whether he admits or denies the factual allegations in the order to show cause and his deportability under the charges contained therein. 8 C.F.R. 242.16(b). This procedure has been held not to violate due process. *Lagui* v. *Immigration and Naturalization Service,* 422 F.2d 807 (7th Cir. 1970).

granted that relief at the close of the hearing despite the voluntary absence of his attorney. In similar situations, the courts have stated that the absence of counsel does not invalidate the hearing where the party suffers no prejudice as a result. *Villa-Jurado* v. *Immigration and Naturalization Service*, 482 F.2d 886 (5th Cir. 1973); *Henriques* v. *Immigration and Naturalization Service, Board of Immigration Appeals*, 465 F.2d 119 (2d Cir. 1972); *Carbonell* v. *Immigration and Naturalization Service*, 460 F.2d 240, 242 (2d Cir. 1972); *De Bernardo* v. *Rogers*, 254 F.2d 81 (D.C. Cir.), *cert. denied*, 358 U.S. 816 (1958); *Madokoro* v. *Del Guerico*, 160 F.2d 164, 166-67 (9th Cir.) *cert. denied*, 332 U.S. 764 (1947). In view of the foregoing, it conclusively appears that the deportation hearing was fundamentally fair and the alien's right to due process was protected.

CONCLUSION

The petition should be dismissed.

Respectfully submitted,

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Form 280 A-Affidavit of Service by Mail
Rev. 3/72

AFFIDAVIT OF MAILING

CA 75-4015

State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 19th day of June 1975 she served a copy of the within

2 copies of govt's brief,

by placing the same in a properly postpaid franked envelope addressed:

Stull & Stull & Brody, Esqs.,
6 East 45th St.
New York, NY 10017

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this
19th day of June 1975

Lawrence Mason

LAWRENCE MASON
Notary Public, State of New York
No. 03-2572560
Qualified in Bronx County
Commission Expires March 30, 1977